In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 568

UNITED STATES OF AMERICA,
vs.
SWIFT & COMPANY, et al.

CONSENT FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned, as counsel for the United States of America, consents to the filing of a brief in the above-entitled matter by Geo. A. Clough on behalf of the American National Live Stock Association, the American National Wool Growers Association, and the National Swine Growers Association, as *amicus curiae.*

Dated, January 16, 1932.

THOMAS D. THACHER,
Solicitor General.

Breed, Abbott & Morgan
15 Broad Street
New York

January 16, 1932.

Mr. George A. Clough,
Hibernia Bank Building,
San Francisco,
California.

U. S. v. Swift & Company, et al.

Dear Mr. Clough:

We have your kind favor of January 4th addressed for the attention of our Mr. William C. Breed. He is now out of the city.

We are not authorized to consent, but we do not understand that our consent is necessary if the Attorney General has consented. In any event, we shall not oppose.

Yours very truly,
Breed, Abbott & Morgan.

In the Supreme Court
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UNITED STATES OF AMERICA, vs. SWIFT & COMPANY, et al.	No. 568
AMERICAN WHOLESALE GROCERS ASSOCIATION, vs. SWIFT & COMPANY, et al.	No. 569
NATIONAL WHOLESALE GROCERS ASSOCIATION, vs. SWIFT & COMPANY, et al.	No. 570

BRIEF OF COUNSEL FOR AMERICAN NATIONAL LIVE STOCK ASSOCIATION, NATIONAL WOOL GROWERS ASSOCIATION AND NATIONAL SWINE GROWERS ASSOCIATION, AS AMICI CURIAE.

The American National Live Stock Association, the National Wool Growers Association, and the National Swine Growers Association, and their component organizations, have moved this Honorable Court for permission to appear in the above entitled actions as

amici curiae and present their views with respect to the issues involved therein.

The American National Live Stock Association is an unincorporated association of persons and organizations engaged in the production of cattle, sheep and other live stock, but principally cattle, in 21 western states, and having its office and principal place of business in the City of Denver, State of Colorado.

The National Wool Growers Association is an unincorporated association of persons and organizations engaged in the production of cattle, sheep and other live stock, but principally sheep, in approximately the same area, and having its office and principal place of business in Salt Lake City, State of Utah.

The National Swine Growers Association is an unincorporated association of persons engaged in the production of swine, and having its office and principal place of business in Creston, Iowa.

The American National Live Stock Association includes in its membership the following organizations:

Albany County Cattle and Horse Growers' Association—Wyoming.

Amador-El Dorado Live Stock Association—California.

American Hereford Cattle Breeders' Association—Missouri.

American Shorthorn Breeders' Association—Illinois.

Arizona Cattle Growers' Association—Arizona.

Arizona Wool Growers' Association—Arizona.

Arkansas Valley Stock Feeders' Association—Colorado.

Bear Creek Stock Growers' Association—Nebraska.

Beaver Cattle Association—Utah.

Beaver Creek Cattlemen's Association—Wyoming.

Beaver Creek Live Stock Association—Oregon.

Big Piney Round-Up Association—Wyoming.

Bridger-Washakie National Forest Association—Wyoming.

California Cattlemen's Association—California.

Cattle and Horse Raisers' Association of Oregon—Oregon.

Cattle Sanitary Board of New Mexico—New Mexico.

Central Fremont Cattle and Horse Association—Oregon.

Colorado Stock Growers' and Feeders' Association—Colorado.

Corn Belt Meat Producers' Association—Iowa.

Crow and Indian Creek Association—Montana.

Delta County Live Stock Association—Colorado.

El Paso County Live Stock Protective Association—Colorado.

Frying Pan Stock Growers' Association—Colorado.

Grand Mesa Live Stock Association—Colorado.

Gunnison County Stock Growers' Association—Colorado.

Highland Hereford Breeders' Association—Texas.

Idaho Cattle and Horse Growers' Association—Idaho.

Jefferson County Stock Association—Montana.

Kern River Live Stock Association—California.

Lake Fork Stock Growers' Association—Colorado.

Little Goose Cattlemen's Association—Wyoming.

Madera County Branch, California Cattlemen's Association—California.

Malad Forest Users' Association—Idaho.

Mancos Cattlemen's Association—Colorado.

Montana Stock Growers' Association—Montana.

Mount Whitney Live Stock Association—California.

Nebraska Stock Growers' Association—Nebraska.

Nevada Land and Live Stock Association—Nevada.

Newfork-Eastfork Live Stock Association—Wyoming.

New Mexico Cattle Growers' Association—New Mexico.

New Mexico Wool Growers' Association—New Mexico.

Niobrara Forest Reserve Users' Association—Nebraska.

Northeast Wyoming Live Stock Protective Association—Wyoming.

Plateau Valley Stock Growers' Association—Colorado.

Pueblo County Stock Growers' Association—Colorado.

Ragged Mountain Live Stock Association—Colorado.

Rio Blanco Farmers' and Stock Growers' Association—Colorado.

Rock Creek Cattle Association—Utah.

Ruby Valley Stock Association—Montana.

San Luis Valley Cattle Growers' Association—Colorado.

Saratoga Valley Stock Growers' Association—Wyoming.

Soda Lake Live Stock Association—Wyoming.

Southern Oregon Live Stock Association—Oregon.

Stock Growers' Protective Association—Montana.

Sublette County Cattle Growers' Association—Wyoming.

Surprise Valley Stockmen's Association—California.

Sweetgrass Stock Growers' Association—Montana.

Texas and Southwestern Cattle Raisers' Association—Texas.

Upper Green River Cattle Association—Wyoming.

Utah Cattle and Horse Growers' Association—Utah.

Villa Grove Grazing District Association—Colorado.

Washington State Cattle and Horse Raisers' Association—Washington.

Wenaha Cattle and Horse Association—Oregon.

West River Stock Growers' Protective Association—South Dakota.

Western Hereford Breeders' Association—Colorado.

Western Slope Cattle Growers' Association—Colorado.

Western South Dakota Stock Growers' Association—South Dakota.

Wood River Live Stock Association—Wyoming.

Wyoming Stock Growers' Association—Wyoming.

Wyoming Wool Growers' Association—Wyoming.

The National Wool Growers Association includes in its membership the following organizations:

Arizona Wool Growers' Association—Arizona.

California Wool Growers' Association—California.

Colorado Wool Growers' Association—Colorado.

Idaho Wool Growers' Association—Idaho.

Montana Wool Growers' Association—Montana.

Nevada Land and Live Stock Association—Nevada.

New Mexico Wool Growers' Association—New Mexico.

Oregon Wool Growers' Association—Oregon.

Texas Sheep and Goat Raisers' Association—Texas.

Utah Wool Growers' Association—Utah.

Washington Wool Growers' Association—Washington.

Wyoming Wool Growers' Association—Wyoming.

We shall hereafter refer to them as the Producers.

The consent decree restrained the defendants from dealing in a large number of what has been described as "unrelated commodities." These included foods other than meats. Approximately ten years after the decree had been entered, upon petition of defendants, the lower Court removed said restraint, so far as pertained to the wholesale trade. The appeal is from the order so modifying the decree.

FINDINGS BASED ON CONFLICTING TESTIMONY BINDING UPON APPELLATE COURT.

The appellants base their appeal upon the grounds: (a) that defendants have a monopoly of food commodities; and (b) that there is a combination in restraint of trade among defendants. Both of these points are covered by the findings of the lower Court.

The rule is laid down broadly in nearly every jurisdiction that the findings of the trial Court in a case tried without a jury will not be disturbed by a reviewing Court where the evidence is conflicting.

2 *Rul. Case Law*, 194;

4 *Corp. Jur.* 883;

McKinley Creek Mining Co. v. Alaska United Mining Co., 183 U. S. 563;

Busch v. Stromberg-Carlson Tel. Mfg. Co., 217 Fed. (C. C. A.) 328.

The lower Court found as follows:

"3. That there have been a few sporadic instances of unfair practices and fixing of prices by the defendants, which are more fully set out in my opinion filed in this case. But that apart from these there exists no contracts, agreements, understandings, combinations or conspiracies among the defendants, or between any two of them, in restraint of trade or commerce among the States; no fixing of prices to be paid by them for live stock, raw materials, or products for resale, bought by defendants or any of them; no fixing of prices at which defendants or any of them shall sell products dealt in by any of them; and no apportioning among defendants, or between any two of them, of territory in which, or

customers with whom, they, or any of them, shall conduct business.

* * * * * * *

"7. That none of the defendants has a monopoly in the meat packing industry.

"8. That neither the four defendants, nor any two of them, are combined to monopolize or to attempt to monopolize the meat packing industry."

These findings were sustained by the evidence hereinafter referred to. At least the evidence created a conflict of testimony. Inasmuch as the issues of "Monopoly" and "Combination in restraint of trade" are the only issues raised by the appeal, and those issues are covered by the findings, in support of which some evidence was introduced, the judgment of the lower Court should stand.

The trial Court also found as follows:

"9. That each of the defendants could materially reduce the cost of distributing meats and other live stock products if it engaged in selling, dealing in and transporting food stuffs other than, and in addition to, meat food products.

"10. That each of the defendants, by dealing in food stuffs other than, and in addition to, meat food products, would be enabled to so distribute its overhead and sales costs as to effect economies in the distribution of both meats and other live stock products and of non-meat food products."

(R. 1111.)

"The greatest good to the greatest number" is a basic principle of our Government. Practically every-

one eats meat. It is a staple food. Whatever process or method of merchandising that will lower the cost of any necessity to the masses should be not only tolerated, but encouraged in every legitimate way.

If by the use of their equipment the packers can distribute to the retailers any kind of commodity at a reduced cost, they should be permitted to do so. If when distributing meats they can, by distributing groceries at the same time, deliver their meats at a lower cost, they should be permitted to handle groceries wholesale.

If when distributing live stock products, they can, by distributing groceries, spread the expense of distribution over both classes of goods, and thereby reduce the cost to the consumer of both meats and groceries, they should be permitted to do so.

We have seen that the lower Court found that defendants could "materially" reduce the cost of meat, live stock products and non-meat food products by dealing in foodstuffs other than meat food products. (Findings, supra.)

If there was a conflict of evidence upon these points, the findings are conclusive upon the Appellate Court.

The following testimony supports the above findings:

It was stipulated that witnesses, numbered 30 to 41, testified generally:

> "It is also believed that the existing conditions would be alleviated and that live stock producers would be benefited if the large packers were per-

mitted to handle at wholesale other food products in addition to meat, so that meat alone would not have to bear the entire cost of distribution."

(R. 476.)

Mr. Frederick S. Snyder, one of the most persuasive witnesses, stated:

"In addition to my connection with this concern for the past forty-three years, I was during the war a member of the United States Food Purchase Board; and chief of the division of coordination of purchase, later chief of the meat division and chief of the cold storage warehouse division, chief of the division of miscellaneous commodities, all under the United States Food Administration. I am also chairman of the board of the American Institute of Meat Packers."

(R. 457.)

His testimony is found on pages 457 to 475 R. Mr. Snyder testified:

"The only salvation for the big packer is to fill up his obsolete branch-house facilities to capacity by handling other lines and having freedom to move *the same as the next hundred packers do.* While mere freedom will not fill a branch house, if they are free to do as the next hundred of their competitors, they will find a way that will make it uncomfortable in three of the seven departments in our business in those respects in which we are now protected by this Consent Decree. We are selling three of our seven lines of merchandise protected against the four large packers by this Consent Decree."

(R. 474.)

"I am of the opinion that the large packers should have entire freedom of action so that whatever method is desirable in their own interest to adopt with reference to distribution, that they shall be free to adopt it; whether it means to finance the retailers in the adoption of the new program or to associate themselves with them in any way they see fit to do. It is a very large, new venture, requires a large amount of capital, a large initiative and merchandising ability, and I think the packers should be free to do that work in whatever manner is best in their own interests; and *I conceive that to be in the interests of all parties, both the public and the stock raisers.*"

(R. 468.)

"The keen competition existing in the food industry exists in the retail field as well as the wholesale. The independent meat packers are able to secure more per pound for their products than the large packers and the reason is obvious. The intermediate independent, large, amply capitalized concern of the kind you refer to find their business chiefly in the territory contiguous to their plant. He sells his merchandise. He does not consign it. The senior packers, operating nationally, sell, so far as they are able to do so, but they are compelled to do two things which the other man escapes. They are compelled to clean up the surplus of material which comes to the central marketing areas, and they are compelled also to consign a very high percentage of their product to their distributing houses and sell it against local demand conditions. They can not create demand. They can only supply it. When they send an excess to the market, and that sells

for less than it sells in Chicago, then their average is pulled down to that extent. They perform a service to the producer by that action. They have also kept their own plants operating at something approximately normal capacity, which is also another economic necessity for them, but they pay a price for it in the reduced income that they get from their goods shipped east. That is a serious handicap to these senior packers. Mind you, when I take this position in which I feel that the present situation is improper, in view of the very radically changed conditions, both with respect to impending developments and those which began four years ago, but are continuing to expand, I am saying that against my own personal interest. But I think in the long run we suffer from the lack of a fair field and no favor principle. I think we all will get on further and be further 25 years from now if in the interim we work on the principle of a fair field and no favor rather than have part of our organizations in this country shackled. I think it is inevitable that these new conditions of distribution will entail a multiplicity of new problems which will affect the defendants very markedly. They should be free to deal with them."

(R. 471-2.)

There was much other evidence upon the points covered by the findings. We present this much to show there was at least a conflict in the evidence relating thereto. There being such conflict, the findings are, as we understand the rule, conclusive upon the Appellate Court, and for that reason the decision of the lower Court should be sustained.

CHAIN STORES ARE ASSURANCE AGAINST MONOPOLY BY BIG FOUR.

The main charge against the defendants was that they monopolized the food supply of the country.

The large volume of trade in foods by chain stores is a reasonable assurance against such monopoly.

The evidence shows:

(1) The increase in the number of stores operated by chains in the United States since the entry of the decree has been without parallel in history.

(2) There are approximately 60,000 stores in the United States operating chain food stores. (R. 1046.)

(3) There are 6000 independent wholesale grocers in the United States. (R. 773.)

(4) There are approximately 300,000 retail food stores in the United States, not including the chain stores. (R. 519, 773.)

(5) Buying in large volume is one of the principal advantages which the defendant packers had over small competitors prior to entry of decree. That advantage is now available to retail chain stores and independent retail and wholesale chain stores. (R. 764-5.)

(6) In 1927 there were 49,787 establishments engaged in the manufacture of food in the United States. (R. 389.)

(7) In 1927 there were 11,774 establishments in the United States engaged in the manufacture of edible food products from animals. (R. 389.)

(8) In 1927 there were 38,013 establishments in the United States engaged in the manufacture of vegetable products and beverages. (R. 389.)

(9) There were in 1927 in the United States 1250 meat packer and slaughter establishments in the United States, that is, 1250 plants. (R. 390.)

(10) 327 of the meat packer and slaughter establishments, referred to in paragraph (9) were in 1927 doing an annual business in excess of $1,000,000.00 each. (R. 391.)

(11) Between fifty and sixty per cent of the retail grocery stores in the United States sell meats. (R. 765.)

(12) Since the end of 1929, 166 new packers, doing a sufficiently large business to bring them under jurisdiction of the act, have come under the administration of the Packers and Stock Yards Act—998 in all. (R. 45.)

(13) Mr. Goldberg of Birmingham, Alabama, started with $23,000.00 capital in 1922. He had increased it to $400,000.00 in 1930. He delivers all of his product by motor trucks. (R. 429.)

(14) Mr. Wilkinson, of Wilkinson Gaddis Company, wholesale grocery and chain, opened up chain stores because "the so-called old line independents were decreasing in number" and the old line retail trade did not exist for his company. Forty per cent of his trade was in meats. (R. 780.)

(15) Rath & Company's business increased from $8,000,000.00 in 1920 to $33,932,000.00 in 1929. (R. 549.)

(16) The business of Morrell & Company increased from $51,000,000.00 gross sales in 1920 to $101,000,000.00 in 1929. (R. 546.)

(17) The car route business of Swift & Company from the City of St. Louis dropped from 8146 cars in 1925 to 4341 in 1929, and is still dropping. The number of carloads from 1930 will be less than that of 1929. (R. 667-8.)

(18) The weight per order for car route distribution dropped from 206 pounds in 1923 to 165 pounds in 1929, a decrease of 41 pounds per order. (R. 669.)

(19) Some independent packers make more money, not only in dollars, but in percentage on invested capital, than Cudahy or Wilson. (R. 736.)

(20) Transportation of food products by auto truck has greatly increased since entry of the Consent Decree. Much of the meat and other foods is produced locally. It would be impracticable for defendants to monopolize transportation of food products by motor trucks. (R. 679-682.)

It would appear from this evidence that there is little danger of the defendant packers obtaining a monopoly of food products.

The chain stores, the organizations of independent grocery stores, and the buying agencies, it would seem, are able to buy and ship on as favorable terms as the larger packers.

Concentrated selling in chain stores of foods other than meats displaces the sale of meats. (R. 694.)

Judged by the results, it is manifest that there is neither any monopoly, nor any successful combination in restraint of trade on behalf of the packers. The independent packers, the chain stores, and the independent chain grocers, have experienced greater prosperity than the defendant packers. If during the ten years last past the packers had outdistanced the chain stores, the independent packers, chain groceries, quick-freezing process as applied to fish, or the renderers of fat and by-products, as those same parties have outdistanced the defendant packers, there would be substantial evidence of a combination in restraint of trade, but when we consider the development of the chain store, the success of independent packers and the improvement in conditions among independent retail grocery chains, it cannot with reason be said that there has existed on behalf of defendants any monopoly or a combination in restraint of trade.

If this business cannot be held by the old line retail store because of inefficiency and antiquated methods—if it stands waiting the advent of new methods and efficiency—is there a legal, moral or equitable reason why the big packer should not be permitted to participate in the competition for that business and to become an actor in the campaign of progress and efficiency?

The live stock producers need the assistance of the most efficient distributing systems. It is unfair to them to restrict or handicap the agencies through which their product is distributed while the distribut-

ing agencies of competing foods are unrestricted. Especially is this true in view of the recent development in independent retail stores and chain stores, good roads, and new methods of transportation.

All new plants and equipment of these small independent packers who are expanding so rapidly and who are taking the business away from the big packers are being paid for out of moneys that are collected from the producers and the consumers. The present equipment of the packers is probably sufficient to handle the business.

If these small packers and retailers and the chain stores can, under normal conditions, take the business away from the big packers, we have only commendation for their efficiency; but if their success is to any material degree the result of the injunctions contained in the consent decree, that decree does then in fact penalize the public and the live stock producers, for they are compelled to pay for duplicate distributing equipment and the incidental loss due to the shifting of business from one group to another.

We submit that the evidence above recited discloses that the defendant packers do not possess a monopoly of meat or any other food product, and that the chain stores, integral and independent, are a reasonable safeguard against a future monopoly by them.

USE OF REFRIGERATOR CARS.

Considerable evidence was introduced in an attempt to make it appear that the defendant packers were permitted to ship dry groceries in their refrigerator cars carrying carcasses of meat, without paying any freight thereon.

Appellants contend that because the packers might ship considerable quantities of dry groceries with their fresh meats and by-products, that they would be able to deliver their groceries at such low figure that they could sell at prices lower than the wholesale grocer, and that there would follow, therefore, a monopoly upon all foods by defendant packers.

It is inconceivable to us that the Interstate Commerce Commission would permit such a thing.

If the packers were able to ship in their refrigerator cars twenty or thirty per cent in weight or volume of dry groceries, it does not seem that even that would enable them to acquire a monopoly of the grocery business, for the volume of meat consumed as compared with the volume of other foods is so small that it would require the shipment of a tremendous amount of meats to enable the packers to supply the average retail grocery trade with groceries shipped free of freight in such refrigerator cars. But, as we understand the law, there is no such thing as free freight. The packers in shipping their meat in refrigerated cars have to pay freight on the groceries in those cars. Instead of having free freight, as conditions have been in the past few years, they have frequently paid penalties for shipping meat in the

refrigerator cars. In 1929 the penalties from the St. Louis branch of Swift amounted to $57,000.00. (R. 668.)

If it should be true that by shipping fresh meat and groceries together, freight costs may be reduced, that would necessarily be available to the independent packers and every person who desired to ship those commodities. If such an economy is possible, it would be against the interest of the public to deny that privilege to those who could use it to the greatest advantage of the public.

The producers favor ownership and use of refrigerator cars by the packers. These cars are a material factor in the distribution of meats and the by-products of live stock. Their use contributes to the economy of distribution. The producers, as well as the packers, should be permitted to take advantage of that economy. Whatever cheapens food to the consumer, or increases the price of live stock to the producer, should be encouraged—not prohibited. The Federal Government is today spending large sums and devoting much consideration to problems designed to relieve agricultural conditions, and also to cheapen necessaries of life to the consumer. The Hoch-Smith Resolution recommending low rates on agricultural products, the creation of the Federal Farm Board and the intermediate credit banks, provision for the creation of the national agricultural credit corporations, the recent two billion dollar legislation, and numerous other acts of Congress, all disclose serious effort on behalf of the Federal Government to relieve existing

unfavorable conditions of the farmers. *Consistency requires that economical methods of distribution of food products be fostered.*

Neither the packers nor the live stock producers have ever objected to the grocer handling meats and live stock by-products. There is no consent decree or statute prohibiting him from doing so, and, in fact, today he is in considerable measure actually doing that very thing. (R. 667.)

It has been estimated by economists that eight billion dollars is the annual bill for waste in distribution of all commodities. Dealing in unrelated commodities and the use of refrigerator cars by the packers would eliminate some of that waste.

Counsel say the packers could ship other goods without cost as "the nature of the meat packing business requires that the cars move in any case." But neither the nature of the packing business nor any other business requires that the cars "move" at a loss.

That is just where the live stock producer is interested. His product must often be handled at a loss in these refrigerator cars. There is no benefit to the public in that.

If the packer should ship other commodities in his car, the live stock producer would not have to bear an unjust portion of the cost of distribution.

If groceries shipped in refrigerator cars bear their fair portion of the cost, they would not be shipped any more cheaply, probably not as cheaply, as if shipped in the usual method.

MOTOR TRUCK TRANSPORTATION.

Next to the chain store, probably the most important development in the purchase and distribution of live stock products and food supplies has been the motor truck transportation. This development is of special importance because of its being peculiarly limited to local conditions. It appears from the testimony that motor truck transportation of live stock to markets and of slaughtered meats and other food products from the packing house to the retailer is confined within a radius of seventy-five to two hundred miles, but principally within seventy-five to one hundred and twenty-five miles. See the following testimony:

R. 426, Hunter, radius 100 to 125 miles; makes possible daily deliveries.

R. 421, Mayer, radius 75 to 100 miles; trucks cheaper; use trucks mostly.

R. 776, Bruner, customers call in own trucks.

R. 779, Herscher, bulk deliveries by truck.

R. 429-30, Goldberg, 85% by truck.

R. 430, Miller, distribute by truck 200 miles; increase in good roads.

R. 432, Fischer, distributes all products by motor trucks, 60% to 70% bought at plant; farmers truck it in.

R. 437, Madden, Knoxville, Tennessee, deliver in trucks up to 100 miles.

R. 436, stipulation; sometimes stock is trucked into plant.

R. 435, Madden; penalty saved by shipping canned goods; deliveries by truck 100 to 125 miles.

It was stipulated by the parties that certain witnesses would testify as follows:

> "2. That in selling their products they can make deliveries by motor truck transportation to advantage up to a radius of 100 to 125 miles from the plant; that in that radius such deliveries are superior to rail deliveries, because they enable store-door deliveries and eliminate cartage charges at points of shipment and destination; and enable more frequent deliveries and the maintenance of more personal contact with their customers; that, for such deliveries, their own trucks are sometimes used for shorter distances, and commercial truck lines for longer distances; that within this radius, this truck method of delivery, which has developed largely in the past ten years, has largely superseded peddler refrigerator car deliveries previously used; that Swift and Armour and other large packers use this mode of delivery, in competition with them."
>
> (R. 436.)

The foregoing testimony discloses that the large defendant packers, in order to maintain a monopoly or combination in restraint of trade in food products, would have to go into each local community and so manipulate his business as to crowd out and eliminate each local representative packer and slaughterer.

We submit that the moment the prices paid by the packers became so low or the prices demanded became so high that more than a close margin of profit was

available, the local independent packers would be on hand to take advantage of the situation.

THE FIXING OF PRICES—RESTRAINT OF TRADE.

Certain testimony was introduced by the Government, apparently for the purpose of showing that the defendant packers had unlawfully combined in the fixing of prices. This, of course, was denied by the defendants. The lower Court regarded the evidence on this point as of little importance. (See Findings 2 and 3, R. 1110.)

But, aside from that, the Government has not attempted to prove that the prices shown to have been established by any of the defendants, and claimed to have been established by them in combination with others, were unreasonable. We understand it to be the law that prices may be lawfully fixed by agreement so long as the prices are not unreasonable and do not constitute a restraint of trade.

It is not unlawful to fix prices if prices are reasonable. Injury to the public is the recognized test of illegality.

Dodge v. Ford Motor Co., 204 Mich. 459, 3 A. L. R. 413;

U. S. v. U. S. Steel Co., 251 U. S. 417.

Counsel on behalf of the Government stipulated as follows:

"It is admitted that there is ample market news service available so that anybody who is interested can learn live stock prices and market

conditions practically whenever they are interested in doing so."

It is apparently contended by counsel for the Government that the interchange of price lists discloses a combination among the packers and their competitors in violation of the law. The interchange of prices has been going on for the past ten years, and, as we recall, it is mandatory under the laws of some States, or, rather, the posting of the prices is.

In considering the evidence, the Court should bear in mind the different circumstances of the Government now and when the decree was entered.

When the decree was entered, it was because of a general public demand of the live stock producers, grocers and other groups. Today the Government finds itself a defendant, as it were, in a proceeding to set aside the decree.

GROCERS v. PACKERS.

MUST THE GROCERS BE FAVORED AS AGAINST THE PACKERS, OR SHALL THEY STAND ON AN EQUAL BASIS?

The appellants are themselves wholesalers. They do not represent the producers nor the consuming public. They are simply competitors of respondents.

The grocers say the packers will take their business. The packers say the grocers—chain store grocers—have taken their business. Probably both are correct. The chain stores have taken some of the packers' trade. If the packers are permitted to handle gro-

eeries, undoubtedly they will get some of that business back. As to who will be the more successful depends upon efficiency. We believe that in this direction lies justice and promotion of the public welfare. If the packers prove the more efficient, they will get the business, and they will deserve it. But the big packers have not proved more efficient than the smaller packers. The record discloses that numerous small packers have in recent years increased their capital and their reserves and have paid larger dividends than respondents. That would seem to prove either that the smaller plants have been more competently managed than the respondents, or that natural or local conditions favored them. If this be true, then the smaller packers are more dangerous as competitors of the appellants than respondents. The smaller packers are not restrained from handling groceries, and if what we have just said be true, then successful small packers are now, and have at all times been, more efficient competitors of appellants than the respondents. If these very successful small packers have not succeeded in taking the business of appellants away from them, there is little reason to fear that the less efficient and larger respondents will do so.

The appellants base their case largely upon the contention that the packers, because of their being able to ship other commodities and meat and its by-products in their refrigerator cars, etc., are able to sell at lower prices and to make greater profits than the small packers. It is conceded that the refrigerator cars are available to everyone, small packers as well

as large. So far as we recall, that fact is not disputed. Now, if there is such a great profit to be made in the distribution of groceries and other commodities with meat and its by-products, why have not the larger independent packers enjoyed this increased profit, and why have they not become a menace to the smaller independents? It does seem that if there were such great profits in this method of combined distribution, that some of the larger packers, such as Morrell & Company, Hormel, Dold and others, would have themselves, by the use of those methods, cut into the business of the appellants. While the business of many of the so-called independent packers has grown by leaps and bounds, it does not appear that the growth was due to the fact that they were not restrained from distributing unrelated commodities with their meats and by-products.

The only basis upon which the defendant packers are subjected to handicaps in their business is that of volume. Appellants fear them because of the volume of their business. It is not unlawful to do business in large volume.

U. S. v. U. S. Steel Co., 251 U. S. 417;
U. S. v. International Harvester Co., 274 U. S. 673.

Under prevailing conditions we are of the opinion that the packers, under proper administration of the Packers and Stockyards Acts, will conduct their business fairly.

If the packers, by reason of better methods, better equipment, or greater efficiency, or for any reason, can deliver to the consumer the commodities handled

by the appellants more cheaply than appellants, then they should be permitted to do so, not prohibited therefrom.

We have not been able to discover from appellants' presentation of their case any motive other than a desire to protect themselves from the competition of respondents. To do this they say this competition is unfair—monopolistic. If they cannot compete in the sale of groceries, surely it will be because they cannot compete on the same terms, which means service and price. If they cannot compete in terms of service and price, the public—producer and consumer—are the ones who will suffer by their being artificially maintained in business. This is not economically sound, nor is it legally just. The appellants have no special right to immunity from competition. The operation of the consent decree in effect amounts to a subsidy in favor of the appellants. No other group of merchants is subsidized so far as we know.

In the "Report of the Federal Trade Commission upon the History and Present Status of the Packers' Consent Decree," dated February 20, 1925, signed by Mr. Nelson B. Gaskill, Commissioner, in the conclusion at page 36, it is stated:

> "The public interest in the field of distribution is in the existence of the open possibility to the development of its greatest efficiency. It would seem that no agency should be excluded therefrom or prevented from proving its worth in that field, unless there is something more than *a conflict with previously asserted private rights presented as an obstacle.*"

We take this to mean that the old line grocer with antiquated methods has no right to protection from his more efficient competitor merely because he "got there first." We submit that the statement expresses a sound policy.

The spread between the wholesale cost of meat and the retail price of meat is believed to be greater at the present time than ever before.

Increase in the cost of distribution of meats has been greater, probably, during the past decade than in any other commodity.

The change in the price of meat at retail to correspond with the price to the producer would be a major influence in maintaining the market for live stock.

The grocers' opposition to the modification of the decree is based upon personal interest, not public welfare.

We concede a like personal interest indirectly in the producers, but our contention is based mainly upon the fact that the public will be benefited by lower prices to the consumer. That will, it is hoped, create a larger demand for the product, and thereby benefit the producer.

APPEAL BY THE GOVERNMENT.

It should be borne in mind that the relief prayed for in the original complaint was based upon the contention that the Big Five packers (a) had a monopoly of the food commodities; and (b) had entered into an unlawful combination in restraint of trade. If the Government were still of the opinion

that there existed the conditions complained of in its original complaint, its position would be consistent, but the Government stipulated as follows:

> "That the individuals, firms and corporations, engaged in the meat packing business in the United States, to the number shown or which may be shown by evidence in this case, owned and controlled independently of each other, are in active competition with each other in the purchase of livestock and in the sales of their products in the various geographical localities and districts within the United States in which they respectively purchase and sell."

Having so stipulated, we do not see how the Government is now in a position to present the same contention which it did in its original bill; nor do we feel that any particular consideration should be given to the fact that the Government has appealed.

QUICK-FREEZING PROCESS.

The live stock producers are hopeful that the quick-freezing process will facilitate and cheapen the storage and distribution of meats; that it will thereby procure a broader, more stable and better market, but the process is still in the experimental stage, as far as meats are concerned. The evidence in this case does not show that the process has been tested to a sufficient extent to make it the basis for an intelligent disposition of the issues involved.

The producers were in favor of the packers retailing meats long before the entry of the consent decree or the passage of the Packers and Stock Yards Act. They may consistently advocate modification of that

decree. See resolution of American National Live Stock Association.

There is no overproduction of meats in the United States. If the price to the consumer were lower, larger quantities would be consumed. The difficulty is the cost to the consumer, not the quantity.

The principal factors in the cost to the consumer are the cost of production and the cost of distribution.

Whatever law or condition restricts the protection or distribution of live stock or its by-products hinders the live stock producer and increases the cost of meat to the consumer.

If the packers were permitted to handle meats and unrelated commodities, it is believed that that would give them access to a larger market, and enable them to pay a better price to the producer of live stock, and lower the cost to the consumer.

The live stock producers desire to sell their product to the best advantage. They must sell to the packers. They desire that the packers be in a position to pay the best possible price. They believe that it would benefit the packers to be permitted to deal in unrelated commodities. Anything that will increase the profits of the packer will, they believe, directly benefit the producer.

No other group of agriculturists are compelled to market their product through agencies burdened with restrictions similar to those imposed by the consent decree.

The large packers have been the major avenues for the marketing of live stock. They have ben prevented by the terms of the decree from competing

with the new conditions. They are not permitted to develop chain retail meat stores, and they are not allowed to handle unrelated commodities or develop their own stores in connection with their established business of distributing and selling meats.

Because of the restrictions placed upon them by the consent decree, live stock and its by-products have been hindered from holding their own with competing products handled by chain stores. Whether or not this method will be permanent or of lasting benefit to the country may not be known, but we are now confronted with "a condition." The only thing that seems likely to maintain and preserve the market for live stock products in their proper relation to other commodities is to make it possible for the agencies handling those products to adopt different methods from those now used, viz., to handle other foods and unrelated commodities.

The consent decree must be modified before defendants can do that.

We respectfully submit that the evidence abundantly sustains the decision of the lower Court, and that the judgment should be affirmed.

Dated, San Francisco, California,
March 9, 1932.

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